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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SHEILA A. BURKE, Defendant and Appellant.	B204090 (Los Angeles County Super. Ct. No. BA321304)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith L. Champagne, Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan S. Pithey and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Sheila Burke was convicted of two counts of fraud (Pen. Code, § 550, subds. (a)(1), (b)(1))[1] and one count of grand theft (§ 487, subd. (a)). On appeal, she contends that as a matter of law she can only be convicted of one count of insurance fraud. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2006, Burke, a longshore worker, was in a work pickup truck on the dock when the pickup was struck by a truck-trailer rig traveling about three to five miles per hour. Damage to the pickup truck was very minor, and Burke was wearing a seatbelt. An ambulance was called. As Burke was about to be transported to the hospital, she told her supervisor she hit her head on the steering wheel and complained her head and left shoulder hurt. The supervisor would later testify her demeanor appeared "over exaggerated, insincere, and ingenine [*sic*]."

The emergency room physician ruled out physical evidence of head trauma and diagnosed a bruised shoulder. Three days later, on November 17, 2006, the treating orthopedic surgeon placed her on total temporary disability based on Burke's complaints of pain and limited range of motion.

In the meantime, the claims handler for the workers compensation carrier became suspicious when Burke refused to provide her address, phone number, and social security number. He retained an investigation firm to surreptitiously record her activities. Over the next several months, while Burke was treating with several doctors and complaining of constant left shoulder and neck pain, radiating down her left arm with any movement, she was videotaped engaging in a variety of activities: walking without a cane, entering and exiting a car without difficulty, driving, removing items from trash and recycling dumpsters near her children's school and placing those items in her car, pumping gas, carrying bags that appeared heavy, trimming a tree with hand clippers, pushing a manual

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[1] Unless otherwise specified, all further references are to the Penal Code.

lawn mower, pulling weeds while squatting, and grooming her dog. According to the investigators, Burke displayed no indications of discomfort or pain.

Burke was on medical leave for approximately three months. Her attorney filed and processed claims for unemployment benefits, and the workers compensation carrier processed medical claims totaling $7,852.58.

Burke represented herself at trial and was the sole defense witness. She testified she "turned all the paperwork over to an attorney very soon after [the accident]. The normal procedure. [¶] . . . We have a right to hire an attorney on a contingency who will take the cases and follow it through. Everything is done through an attorney." On cross-examination, she could not recall many of the details of her doctor visits, the inconsistencies in her injury and pain reports, or the activities depicted in the surveillance video.

The jury convicted Burke of all three counts. She was represented by counsel at the sentencing hearing. The court suspended proceedings and placed Burke on three years formal probation, on condition, *inter alia*, that she spend 365 days in the county jail, make restitution, and perform community service. She was given credit for time served, with the balance of the jail sentence stayed for nine months to assess her progress on probation.

DISCUSSION

Burke argues subdivisions (a)(1) and (b)(1) of section 550 "merely describe the various ways that a defendant may commit the crime of insurance fraud [and] . . . do not constitute separate or divisible insurance fraud offenses of which a defendant . . . may be convicted. Where there was but one alleged fraudulent injury, one false or fraudulent claim, and one victim, there was only one crime " We disagree.

Per subdivision (a)(1), it is a felony to "[k]nowingly present or cause to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance." Subdivision (b)(1) makes it a

crime to "knowingly . . . [p]resent or cause to be presented any written or oral statement as part of, or in support of . . . a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact." A violation of subdivision (b)(1) is punishable as either a felony or misdemeanor. In other words, one who falsely or fraudulently claims a loss, whether or not insurance is involved, is guilty of violating subdivision (a)(1). One who supplies false proofs of loss or statements to obtain an insurance benefit, whether or not the claim itself is legitimate, is guilty of violating subdivision (b)(1).

Burke first contends she should be treated in the same manner as a forgery defendant who first forges and then passes a check. A defendant who forges a check or knowingly attempts to pass a forged check or does both with respect to the same check "is not therefore guilty of as many forgeries as there are acts, but of one forgery only." (*People v. Frank* (1865) 28 Cal. 507, 513.) In *People v. Ryan* (2006) 138 Cal.App.4th 360, the Court of Appeal explained that forging and then passing the same check constituted "separate means of committing the same offense. This conclusion is supported by the fact that the mens rea is the same for each (intent to defraud), as is the punishment." (*Id.* at p. 367.)

Here, while mens rea for the offenses described in subdivisions (a)(1) and (b)(1) is the same (intent to defraud), the subdivisions describe different offenses which are committed and may be punished in different ways. Burke violated subdivision (a)(1) when she caused her attorney to submit a false claim for disability benefits. She violated subdivision (b)(1) on multiple occasions when she made statements to physicians and others concerning the extent and duration of her injuries, which resulted in bills for unnecessary medical treatments that were submitted in support of the false claim. It cannot be said that filing a false claim of loss and then submitting false proofs of loss in support of a claim for insurance benefits are "separate means of committing the same offense." (*People v. Ryan, supra,* 138 Cal.App.4th at p. 367.)

Rather, the situation here is more akin to that in *People v. Horowitz* (1949) 33 Cal.2d 534. There, defendant was convicted of four separate offenses: forging a will,

preparing a false will with the intent to defraud by producing it in a probate hearing, filing a false will, and offering a false will in evidence. The Supreme Court affirmed all four convictions, noting defendant committed four separate offenses on four different occasions. Burke committed two separate offenses: The crime of presenting a false claim of loss under section 550, subdivision (a)(1) was complete when she first made a claim for payment. She committed a separate crime pursuant to section 550, subdivision (b)(1) when she supported that claim with statements to medical and insurance personnel concerning her injuries and inability to work.

Nor are we persuaded the single-intent-and-plan doctrine applies to Burke's fraud convictions. (*People v. Bailey* (1961) 55 Cal.2d 514.) In *Bailey*, defendant lied to the social worker to establish eligibility for welfare benefits. Rather than charge defendant with multiple counts of petty theft, the prosecutor aggregated their value; and defendant was convicted of one count of grand theft. The *Bailey* doctrine establishes that "in theft-by-false pretense cases, the separate receipt of various amounts of money as part of a 'single plan' 'may be cumulated to constitute but one offense of grand theft.'" (*Id.* at p. 518.)

Burke admits she has not discovered any case that has applied the single-intent-and-plan doctrine to crimes under section 550. She nonetheless argues her conduct in pursuing workers compensation benefits is much like that of the *Bailey* defendant, and she should be convicted of only one count of fraud.

People v. Drake (1996) 42 Cal.App.4th 592 is instructive on this point. There, defendant physician submitted multiple Medi-Cal reimbursement claims for patients he did not treat and was convicted of multiple counts of Medi-Cal fraud. The doctor contended he could be convicted of only one count of Medi-Cal fraud, as the series of fraudulent claims constituted only one offense against one victim. (*Id.* at p. 596.) The Court of Appeal disagreed, describing theft as an "ends" offense, where "the essence of the offense" is the amount of money taken. (*Id*. at p. 597.) Fraud offenses, on the other hand, are concerned with the "means," i.e., "the essence of the Medi-Cal fraud offense [is] the intentional submission of a false or fraudulent claim." (*Ibid.*) So it is here. The

essence of Burke's fraud was the submission of a false claim of injury, supported by false claims for workers compensation insurance benefits. She was properly convicted of two counts of fraud.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

DUNNING, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.